BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID H. JONES Claimant	)	
VS.	)	Docket No. **1,030,753**
TYSON FRESH MEATS, INC. Self-Insured Respondent	)	

ORDER

The self-insured respondent requests review of the October 8, 2007 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 8, 2008.

APPEARANCES

Michael C. Helbert of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined claimant did not suffer a permanent back injury and instead suffered two scheduled injuries. The ALJ further found claimant permanently and totally disabled as respondent did not rebut the presumption that claimant sustained a permanent total disability as a result of his work-related scheduled injuries to his right shoulder and left leg.[1]

The respondent requests review of the nature and extent of disability. Respondent argues the vocational expert's uncontradicted testimony established claimant retained the ability to perform substantial gainful employment. Consequently, respondent further

[1] *See Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

argues claimant is only entitled to two scheduled injuries and the Board should adopt Dr. MacMillan's impairment ratings for those scheduled members.

Conversely, claimant requests the Board to affirm the ALJ's Award. In the alternative, claimant argues that he suffered a whole body impairment and is entitled to a work disability. Claimant next argues that K.A.R. 51-7-8 is void because it conflicts with K.S.A. 44-510d. Claimant notes that in the calculation of an award for loss of use of a scheduled member the regulation directs that the number of weeks paid for temporary total disability are deducted from the number of weeks allowed for loss of use of the scheduled member before that number is multiplied by the percentage of disability. Claimant further argues that K.S.A. 44-510d specifically provides for an award of permanent partial disability after the period of temporary total disability without direction to deduct the weeks paid for temporary total disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

David Jones is a high school graduate who became employed by respondent in January 1969. He started work as a maintenance mechanic and then moved to a position described as a gear box mechanic. His job of rebuilding gear boxes required him to retrieve the gear box from a pallet, put it up on a hoist, drain the oil, place it on the work bench and then tear it apart. The parts were then placed in a cleaner for inspection. After the inspection, the gear box was placed back on the bench and the bearings and seals were pulled off the shafts in order to be replaced. The gear box was then put back together.

On December 7, 2004, claimant was struck by a forklift, knocked down and run over. He suffered a rotator cuff tear of his right shoulder and a comminuted fracture of the tibia and fibula in his left leg. Surgery was performed the same day for open reduction and internal rod fixation of the tibial fracture. Claimant developed a pseudo-arthrosis at the site of the tibial fracture. That condition was described as a non-union where instead of the bone healing with bone, it heals primarily with scar tissue.

In April 2005, Dr. Jeffrey MacMillan took over treatment for claimant's lower leg. On May 17, 2005, Dr. MacMillan performed surgery on claimant's left leg. The procedure consisted of removal of the intermedullary rod and removal of the scar tissue with grafting in the cavity and attachment of a metal plate to hold everything together. Dr. MacMillan also provided treatment for claimant's right shoulder and discussed various treatment options which ranged from doing nothing, to using oral medications with cortisone injections, physical therapy and home exercises as well as the final option of surgery.

Ultimately, the claimant opted to just take medications for his shoulder pain and see if his shoulder pain interfered with his lifestyle.

Claimant testified that during his physical therapy he heard his back pop while performing leg exercises on a machine and has back pain as a result.

In October 2005, claimant was released to light-duty work earning the same amount he was earning at the time of his injury. Claimant eventually returned to his old job and on approximately July 22, 2006, after attempting the job for a week, he notified the respondent he was not able to perform the job. Respondent completed paperwork for claimant to be placed on medical leave. Claimant was required to check with respondent every Wednesday to see if there was a job available that he could perform.

Claimant still continues to check with respondent every Wednesday to see if there are jobs available that he can perform. Claimant agreed that he has more seniority than almost any one working for respondent and that seniority is a factor in awarding a job to applicants. Claimant testified that there have been occasions where respondent has suggested that he bid on certain jobs but he made the determination not to place a bid. Claimant testified:

> Q. You mentioned that often times that there's no jobs provided for you to consider, but there have been sometimes when your contact at the plant brings a job to your attention and suggest you bid on it, is that right?
>
> A. Yes.
>
> Q. How often has that happened?
>
> A. Not very often.
>
> Q. Five times or more?
>
> A. Five times or less.
>
> Q. On each of those occasions you had a chance to review the job and what was required to perform the job, is that right?
>
> A. Yes.
>
> Q. And on each of those occasions you made up a decision on your own that you would not bid for the job?
>
> A. Yes.
>
> Q. Do you recall what jobs were given to you for consideration?

A. No.[2]

Claimant further testified that he had not looked for work anywhere else except for Tyson. The last day claimant worked for respondent was July 24, 2006. Claimant was earning $16.90 per an hour at the time of his accident. Claimant applied and began receiving Social Security disability in November 2006. Claimant testified that he is not able to raise his arm above chest level and walks with a limp due to his injuries. He also has back pain when he bends over or after being on his feet for extended periods of time.

Dr. Edward J. Prostic, board certified orthopedic surgeon, examined and evaluated the claimant at his attorney's request. On December 12, 2006, Dr. Prostic took a history from claimant and performed a physical examination. Claimant had a massive rotator cuff tear in his right shoulder and healed fractures of the right tibia and fibula as well as mild L5 radiculopathy from an arthritic low back. The doctor opined the claimant's physical examination was consistent with the claimant's complaints of pain as well as the mechanism of his work-related injury. Dr. Prostic recommended the hardware be removed from claimant's left leg and that claimant receive epidural steroid injections for his radicular symptoms in his low back. The doctor also opined claimant would need a major shoulder reconstruction in the future. Based upon the AMA *Guides*[3], Dr. Prostic opined claimant has a 30 percent permanent partial functional impairment to his right upper extremity, a 10 percent to the body as a whole for the low back, a 15 percent to the left lower extremity. These impairments combine for a 30 percent body as whole functional impairment.

Dr. Prostic imposed restrictions against frequent bending or twisting at the waist, forceful pushing or pulling, or more than minimal climbing, squatting or kneeling as well as no use of the right hand at or above shoulder height more than minimally. Claimant was also restricted to light to medium level lifting restrictions. Dr. Prostic opined claimant was not able to perform 10 out of the 17 tasks from a task list created by Mr. Doug Lindahl. This results in a 59 percent task loss.

At his last examination of the claimant on April 27, 2006, Dr. MacMillan noted claimant had less forward flexion than he had in April 2005 and he had bilateral symmetrical knee motion. Claimant had reached maximum medical improvement for his right shoulder and left knee. Dr. MacMillan rated claimant at 17 percent to the left lower extremity and his right upper extremity at 15 percent. The doctor placed permanent restrictions on claimant of occasional use of right hand above shoulder level and light-medium physical demand work.

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[2] R.H. Trans. at 36-37.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On April 12, 2007, the ALJ ordered an independent medical examination by Dr. Peter V. Bieri to determine a disability rating and apportionment of any preexisting impairment as well as a task loss opinion. Dr. Bieri performed a physical examination and determined an impairment rating based upon the AMA *Guides*. The doctor rated claimant's right upper extremity at 6 percent due to range of motion deficits and 15 percent to the right upper extremity due to weakness of the supraspinatus and infraspinatus muscles. These percentages combine for a 20 percent rating for the right upper extremity and this converts to a 12 percent whole person impairment. Dr. Bieri also rated claimant's left lower extremity at 20 percent due to residuals of tibial shaft fracture and 15 percent due to weakness and range of motion deficits of the left ankle. These lower extremity impairments combine for a 32 percent to the left lower extremity which converts to a 13 percent whole person impairment. The combined whole person impairments result in a 23 percent. Dr. Bieri opined claimant did not meet the criteria for an impairment rating to the lower back and did not offer an opinion regarding any preexisting impairment. At the time of Dr. Bieri's evaluation, the claimant had reached maximum medical improvement and the doctor placed permanent restrictions on the claimant of occasional lifting to 30 pounds, frequent lifting not to exceed 20 pounds and no more than 10 pounds of constant lifting; no above shoulder level and overhead use of the right shoulder; as well as squatting, crawling, kneeing, crouching, climbing and descending ladders are precluded.

Doug Lindahl, a vocational rehabilitation counselor, conducted a telephone interview with claimant on January 18, 2007, at the request of claimant's attorney. He prepared a task list of 17 nonduplicative tasks claimant performed in the 15-year period before his injury. Although the claimant was not working Mr. Lindahl checked the Kansas Job Link website for Lyon County on January 18, 2007 and determined there were 113 job openings on that day. Mr. Lindahl then concluded that 3 of those jobs listed on that day were within claimant's educational ability and his restrictions. The three jobs were for a dishwasher, fast-food worker and a security officer. Claimant was not looking for work anywhere else except at Tyson. Mr. Lindahl opined claimant was capable of earning from $6 to $8 an hour or between $240 and $320 a week. Mr. Lindahl's review of those positions lead him to believe claimant retains the ability to perform those jobs within his restrictions.

Claimant argues that he suffered permanent impairment to his back as a result of an injury suffered during physical therapy for his left leg. Dr. MacMillan provided claimant treatment for his left leg and could not recall any back complaints. Moreover, Dr. MacMillan has his patients fill out a form at each visit to update their condition as well as list physical complaints and claimant never expressed any back complaints on the forms. Dr. Bieri noted claimant complained of low back pain but he determined that claimant failed to meet the criteria for permanent impairment attributable to the accidental injury. Although Dr. Prostic concluded claimant had aggravated a preexisting arthritic condition in his back he noted claimant had no pain upon manipulation of his back. The ALJ concluded the claimant's back condition, if any, was temporary. The Board agrees and affirms.

As a result of his work-related accidental injury claimant suffered a rotator cuff tear of his right shoulder and a comminuted fracture of the tibia and fibula in his left leg. All three doctors concluded claimant suffered permanent functional impairment to his right shoulder and left lower extremity and provided ratings. Both the shoulder and lower leg are included on the schedule of injuries listed in K.S.A. 44-510d.

In *Casco*[4], the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel, non-simultaneous injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as a unscheduled whole body injury, under K.S.A. 44-510e(a). After examining the applicable statutes and the relevant case law, the *Casco* Court departed from the well-recognized and long-established case law going back over 75 years. In doing so, it provided certain rules. They are as follows:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.
>
> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[5]

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[4] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[5] *Id.*, Syl. ¶'s 7-10.

In any combination scheduled injuries are now the rule, while nonscheduled injuries are the exception.[6] There is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.[7]

Drs. Bieri, MacMillan and Prostic all provided claimant with permanent physical restrictions but none of the physicians opined that claimant was essentially and realistically unemployable. Moreover, Mr. Lindahl, the vocational expert, opined that claimant retained the ability to earn between $6 and $8 an hour and that there were jobs available in the county where claimant resided that could be performed within claimant's restrictions. The claimant apparently did not consider himself permanently disabled as he continued to check with respondent every Wednesday to see if there were jobs he thought he could perform. And he noted that there were at least five occasions where respondent had indicated it appeared claimant, within his restrictions, could perform an available job but claimant had declined to bid. A review of the entire evidentiary record establishes claimant retains the ability to engage in substantial gainful employment. Consequently, claimant's recovery is limited and he is not entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2) but is entitled to compensation for two scheduled injuries. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*. Accordingly, the ALJ's Award is hereby modified to reflect two separate scheduled injuries rather than a permanent total disability as a result of claimant's work-related accident.

K.S.A. 44-510d(23) provides that loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Drs. Prostic, MacMillan and Bieri all offered opinions, based upon the AMA *Guides,* regarding claimant's functional impairment. Dr. Prostic opined claimant has a 30 percent permanent partial functional impairment to his right upper extremity and a 15 percent permanent partial functional impairment to the left lower extremity. Dr. MacMillan opined claimant has a 15 percent permanent partial functional impairment to his right upper extremity and a 17 percent permanent partial functional impairment to the left lower extremity. Dr. Bieri opined claimant has a 20 percent permanent partial functional impairment to his right upper extremity and a 32 percent permanent partial functional impairment to the left lower extremity.

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[6] *Id.*, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[7] *Casco*, 283 Kan. 508 Syl. ¶ 9.

After considering all three doctors' opinions, the Board finds that an average of the ratings provided by these doctors is a reasonable approach. Thus, the Award is modified to reflect a 22 percent permanent partial functional impairment to the right upper extremity at the level of the shoulder and a 21 percent permanent partial functional impairment to the left lower extremity at the level of the lower leg.

When computing the weeks of permanent partial disability benefits an injured worker is entitled to receive for an injury listed in the schedule of K.S.A. 44-510d, are the weeks of temporary total disability benefits deducted from the number of weeks provided in the schedule of K.S.A. 44-510d?

K.A.R. 51-7-8 provides that the number of weeks paid for temporary total disability are deducted from the number of weeks allowed for loss of use of the scheduled member before that number is multiplied by the percentage of disability. Claimant argues that K.A.R. 51-7-8 is void because it conflicts with K.S.A. 44-510d. Claimant further argues that K.S.A. 44-510d specifically provides for an award of permanent partial disability after the period of temporary total disability without direction to deduct the weeks paid for temporary total disability compensation. Consequently, claimant requests the Board to determine the regulation is void as it violates the statute.

Claimant points out that K.S.A. 44-510e provides for calculation of an award for a whole person permanent partial disability and specifically mandates deduction for temporary total disability compensation. Likewise, K.S.A. 44-510f(a)(1) provides that the maximum compensation paid for an award for permanent total disability includes any payments of temporary total disability compensation. But, K.S.A. 44-510d which provides for scheduled disabilities does not specifically mandate deduction of the temporary total disability compensation and instead simply states "compensation shall be paid for temporary total loss of use and as provided in the following schedule." K.S.A. 44-510d does not mandate deduction of the temporary total disability compensation but instead uses the conjunctive "and" to indicate compensation shall be paid for temporary total and then as provided in the schedule for the particular scheduled member.

The claimant's argument is compelling but the Board must first determine if it has jurisdiction to grant claimant the relief requested. Stated another way, can the Board determine that a duly promulgated regulation is void?

There is no question the Director of Workers Compensation may adopt the rules and regulations that are necessary for administering the Workers Compensation Act. The Act provides:

> The director of workers compensation may adopt and promulgate such rules and regulations as the director deems necessary for the purposes of administering and enforcing the provisions of the workers compensation act. . . . All such rules and

> regulations shall be filed in the office of the secretary of state as provided by article 4 of chapter 77 of the Kansas Statutes Annotated and amendments thereto.[8]

And administrative regulations that are adopted pursuant to statutory authority for the purpose of carrying out the declared legislative policy have the force and effect of law.[9] Administrative agencies are generally required to follow their own regulations and failure to do so results in an unlawful action.[10]

Moreover, the Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional. Stated another way, the Board is not a court of proper jurisdiction to decide the constitutionality of laws in the State of Kansas. Because a regulation has the force and effect of law, such a regulation is as binding on the administrative agency as if it was a statute enacted by the legislature. Consequently, the Board concludes that it does not have jurisdiction and authority to determine that a regulation is void.

The Board does have jurisdiction to interpret and apply both laws and regulations. K.S.A. 44-510d does not address how temporary total disability benefits figure into the computation of an award for a scheduled disability. Indeed, the Act is silent. Consequently, K.A.R. 51-7-8 was adopted and it provides:

> (a)(1) If a worker suffers a loss to a member and, in addition, suffers other injuries contributing to the temporary total disability, compensation for the temporary total disability shall not be deductible from the scheduled amount for those weeks of temporary total disability attributable to the other injuries.
>
> (2) The weekly compensation rate for temporary total compensation shall be computed by multiplying .6667 times the worker's gross average weekly wage. This figure shall be subject to the statutory maximum set in K.S.A. 44-510c.
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> (b) If a healing period of 10% of the schedule or partial schedule is granted, not exceeding 15 weeks, it shall be added to the weeks on the schedule or partial schedule before the following computations are made.
>
> (1) If a loss of use occurs to a scheduled member of the body, compensation shall be computed as follows:
>
> (A) deduct the number of weeks of temporary total compensation from the schedule;
>
> (B) multiply the difference by the percent of loss or use to the member; and
>
> (C) multiply the result by the applicable weekly temporary total compensation rate.

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[8] K.S.A. 44-573.

[9] See K.S.A. 77-425; *Harder v. Kansas Comm'n on Civil Rights*, 225 Kan. 556, Syl. ¶ 1, 592 P.2d 456 (1979); *Vandever v. Kansas Dept. of Revenue*, 243 Kan. 693, Syl. ¶ 1, 763 P.2d 317 (1988).

[10] *Vandever*, 243 Kan. 693, Syl. ¶ 2.

(2) If part of a finger, thumb, or toe is amputated, compensation shall be calculated as follows:

(A) multiply the percent of loss, as governed by K.S.A. 1996 Supp. 44-510d, as amended, by the number of weeks on the full schedule for that member;

(B) deduct the temporary total compensation; and

(C) multiply the remainder by the weekly temporary total compensation rate.

(3) If a scheduled member other than a part of a finger, thumb, or toe is amputated, compensation shall be computed by multiplying the number of weeks on the schedule by the worker's weekly temporary total compensation rate. The temporary total compensation previously paid shall be deducted from the total amount allowed for the member.

(c)(1) An injury involving the metacarpals shall be considered an injury to the hand. An injury involving the metatarsals shall be considered an injury to the foot.

(2) If the injury results in loss of use of one or more fingers and also a loss of use of the hand, the compensation payable for the injury shall be on the schedule for the hand. Any percentage of permanent partial loss of use of the hand shall be at least sufficient to equal the compensation payable for the injuries to the finger or fingers alone.

(3) An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.

(4) An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

(5) If the tip of a finger, thumb, or toe is amputated, the amputation does not go through the bone, and it is determined that a disability exists, the disability rating shall be based on a computation of a partial loss of use of the entire finger. (Authorized by K.S.A. 1996 Supp. 44-510d and K.S.A. 44-573; implementing K.S.A. 1996 Supp. 44-510d; effective Jan. 1, 1966; amended Jan. 1, 1971; amended Jan. 1, 1973; amended, E-74-31, July 1, 1974; amended May 1, 1975; amended Feb. 15, 1977; amended May 1, 1978; amended May 1, 1983; amended, T-88-20, July 1, 1987; amended May 1, 1988; amended May 22, 1998.)

Although the regulation is somewhat lacking in clarity, it does indicate that the weeks of temporary total disability benefits are to be deducted from the maximum number of weeks provided in the schedule before multiplying by the functional impairment rating to obtain the number of weeks of permanent disability benefits due the injured worker. Accordingly, until an appellate court determines that the Board has jurisdiction to determine whether a regulation contradicts the statute and declare a regulation void, the Board will continue to apply K.A.R. 51-7-8 in the calculation of awards for scheduled injuries.

Consequently, claimant's award of permanent partial disability benefits must be computed after reducing the maximum weeks by the temporary total disability weeks. The parties stipulated the claimant received 43.71 weeks of temporary total disability compensation. But there was no indication whether the weeks paid were applicable to the lower leg or the upper extremity injuries. However, the evidence established that claimant's leg injury required surgeries and the most significant medical treatment. And the shoulder primarily received conservative treatment. Accordingly, the temporary total

disability weeks will be deducted from the calculation of benefits for the scheduled injury to the lower leg.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 8, 2007, is modified to award claimant compensation for two separate scheduled injuries.

For the left lower extremity injury, claimant is entitled to 43.71 weeks of temporary total disability compensation at the rate of $448.35 per week in the amount of $19,597.38 followed by 30.72 weeks of permanent partial disability compensation, at the rate of $448.35 per week, in the amount of $13,773.31 for a 21 percent loss of use of the left lower leg, making a total award of $33,370.69.

For the right upper extremity injury, claimant is entitled to 49.50 weeks of permanent partial disability compensation, at the rate of $448.35 per week, in the amount of $22,193.33 for a 22 percent loss of use of the right shoulder.

The two separate scheduled injuries combine for a total of $55,564.02 in temporary total and permanent partial disability compensation which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge